No. 87-1373

In the Supreme Court of the United States

OCTOBER TERM, 1987

DARRALYN BOWERS AND CHARLES BECKHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge who authorized electronic surveillance lacked the neutrality and detachment required by the Fourth Amendment, so that petitioners were entitled to suppression of the evidence obtained through the surveillance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 828 F.2d 1169.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1987. A petition for rehearing was denied on December 1, 1987 (Pet. App. B1). The petition for a writ of certiorari was filed on January 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were each convicted on one count of participating in an enterprise

through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and four counts of mail fraud, in violation of 18 U.S.C 1341. In addition, petitioner Beckham was convicted on seven counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and petitioner Bowers was convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d). Beckham was sentenced to three years' imprisonment and was ordered to forfeit $16,675. Bowers was sentenced to four years' imprisonment and was ordered to forfeit her interest in and the profits she had received from the enterprise. The court of appeals affirmed (Pet. App. 1a-17a).

The facts, which are not in dispute, are summarized by the court of appeals (Pet. App. 2a-9a). The prosecution arose out of the management of the Detroit Water and Sewerage Department (DWSD). On March 21, 1979, after finding that the Detroit sewage treatment plant was not in compliance with a 1977 consent decree, United States District Judge John Feikens appointed Detroit Mayor Coleman Young as Administrator of DWSD with "full power and authority to control, manage and operate the City of Detroit Wastewater Treatment Plant." *United States* v. *City of Detroit*, 476 F. Supp. 512, 515 (E.D. Mich. 1979). The court specifically gave the Mayor, as Administrator, "the power to bypass the Detroit City Council in awarding contracts and the power to award contracts without competitive bidding" (Pet. App. 3a). This grant of power was designed to enable the Mayor to ensure compliance with the consent decree by authorizing him to bypass the normal municipal decisionmaking channels when it was necessary to do so (476 F. Supp. at 520-521).

In January 1980 Mayor Young appointed petitioner Beckham to the position of director of the DWSD wastewater treatment plant. Within the next few months, petitioner Bowers, a close friend of Mayor Young, invited

Jerry Owens, a clothing retailer from Mississippi, to come to Detroit so that he could enter the sludge disposal business in association with herself, Sam Cusenza, and Joseph Valentini. Cusenza and Valentini were associated with Michael Ferrantino, whose company, Michigan Disposal, Inc., already had a contract to dispose of sludge generated by DWSD's wastewater treatment plant. Petitioner Bowers and her associates planned to use Owens, who is black, as the "front man" for an ostensibly minority-controlled enterprise that would obtain city business on a preferential basis as a "minority contractor." Pet. App. 3a.

Pursuant to the scheme, a corporate entity called "Vista Disposal" was organized. Owens was the president of Vista and nominal owner of all of its stock. Under the arrangement set up by Bowers, however, half of the business's profits were to go to Cusenza and Valentini, and half were to go to Bowers and Owens. Pet. App. 3a. Vista would be given access to a sludge-disposal site controlled by Cusenza, Valentini, and Ferrantino (*id.* at 4a).

In the spring and summer of 1980, Vista submitted to the City of Detroit a number of proposals for a contract under which Vista would become the city's second sludge hauler. In August 1980 petitioner Beckham, as director of DWSD, notified Vista that it had been selected to present a formal proposal to the city, and in September 1980 the city began to negotiate a contract with Vista. Throughout that period, Owens made false statements to the city concerning Vista's ownership, its corporate status, and its ability to obtain a performance bond, and he misrepresented his own qualifications. The interests of petitioner Bowers and the other silent partners in Vista were concealed. Pet. App. 4a-5a.

The proposed award of the contract to Vista was presented to the Detroit City Council for approval in the

fall of 1980. The Council's decision was delayed, however, by Beckham's failure to respond satisfactorily to inquiries from the Council concerning the proposed Vista contract. Pet. App. 5a. On October 15, 1980, the Council presented Beckham with a series of questions concerning Vista and voted to resume consideration of the contract one week later, on October 22 (Gov't C.A. Br. 8-9). On October 17, Beckham wrote the Council, advising it that because of its inaction on the Vista contract he would ask the Mayor to approve the contract pursuant to the extraordinary powers granted him by the district court (*id.* at 9). The Mayor did so on October 20, 1980 (Pet. App. 5a).

In November 1980, the Detroit office of the Federal Bureau of Investigation (FBI) became aware that Owens had entered into a plea agreement in Mississippi on unrelated charges, and that as part of that agreement he had promised to cooperate with the government (Gov't C.A. Br. 10). FBI agents approached Owens, and he agreed to assist in an investigation of his Vista associates (Pet. App. 6a).

According to Owens, the day after the contract was awarded to Vista the Vista confederates agreed that Beckham had been helpful and should be given $2000 monthly (Gov't C.A. Br. 10). Owens stated that in November 1980 petitioner Bowers told him that she had given Beckham his first $2000 (Pet. App. 6a). On December 5, 1980, Owens secretly tape-recorded a meeting at which he, Bowers, and the other Vista confederates agreed to an allocation of Vista's profits. On January 20, 1981, he recorded a conversation in which Bowers told him that she had given Beckham $6000 so far. On January 27, 1981, Owens recorded a meeting at which he gave Beckham a coat that Beckham did not pay for. *Ibid.* On March 24, 1981, Owens recorded a conversation in which he and Bowers discussed renting an apartment for

Beckham; Bowers said that she would deduct the rent from Beckham's "two" (*id.* at 7a).

By the end of March 1981, the federal investigators decided that they had enough evidence to justify seeking authorization for a wiretap on Bowers' telephone, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Because of Judge Feikens' involvement in the operation of the Detroit Water and Sewage Department, the United States Attorney informed Judge Feikens about the investigation and his plan to request authorization for electronic surveillance. Pet. App. 7a. The United States Attorney "asked Judge Feikens at this time whether the matter of getting a warrant for the wiretaps should be handled by Judge Feikens or the 'miscellaneous judge' " (*ibid.*). Judge Feikens subsequently reported "that he had discussed the matter with the miscellaneous judge * * * and that the two had agreed that Judge Feikens should 'review any application to conduct electronic surveillance' " (*ibid.* (quoting affidavit of former United States Attorney)).

The government then presented Judge Feikens with a lengthy affidavit setting forth the evidence that had been collected with Owens' cooperation. On March 31, 1981, Judge Feikens authorized the first wiretap on Bowers' telephone. He authorized surveillance on eight subsequent dates, ending on September 2, 1981. Pet. App. 7a-8a.

Through the spring and summer of 1981, Owens' cooperation and the wiretaps produced further evidence of the Vista scheme and the bribery of Beckham. Owens and Bowers continued to discuss the payments to Beckham. Beckham discussed with Owens the apartment that the Vista associates were financing. On June 2, 1981, Owens arranged to record and videotape a meeting at which Bowers delivered an envelope containing $2000 to Beckham, and Owens once again provided Beckham with

free clothing. Pet. App. 8a. On August 4, 1981, FBI agents observed a meeting at which Bowers handed Beckham an envelope (*id.* at 9a).

2. Petitioners were tried before United States District Judge Robert DeMascio.[1] They moved for suppression of the wiretap evidence on the ground that Judge Feikens lacked the neutrality and detachment necessary to provide lawful authorization for the electronic surveillance. Petitioners argued that Judge Feikens was insufficiently neutral and detached because of his personal concern for the success of the water and sewerage department; because he had a personal dislike for petitioners; and because he had evidenced prejudice against persons of petitioners' race. Pet. App. 10a-17a. The district court rejected those claims, and the court of appeals affirmed (*id.* at 9a-17a).

The court of appeals first noted (Pet. App. 11a-12a) that when this Court has held a warrant-issuing magistrate to be insufficiently neutral it has relied either on a pecuniary interest on the part of the magistrate or on a close identification of the magistrate with the prosecution. The court of appeals found that petitioners had not suggested that Judge Feikens was subject to either kind of bias. As to Judge Feikens' concern for the water and sewerage department, the court of appeals found that "the Title III authorizations antedated Judge Feikens' principal involvement in the affairs of the department" (*id.* at 12a) and that "the prewiretap authorization occurrences called to our attention by [petitioners] are insufficient to support a claim that Judge Feikens was biased" (*id.* at 13a).

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[1]Petitioners were initially tried along with Cusenza, Ferrantino, Valentini, and Charles Carson, Vista's attorney. The jury was unable to agree on a verdict, and a mistrial was declared. Valentini, Cusenza, and Carson subsequently pleaded guilty to certain of the charges; Ferrantino died before he could be retried. Petitioners were tried a second time and convicted on all counts. Pet. App. 9a.

Next, the court of appeals found (Pet. App. 14a) that "[t]he claim that Judge Feikens harbored some sort of personal animosity toward [petitioners] is likewise unsubstantiated." The court pointed out that "[a]lmost every alleged indication of hostility toward [petitioners] in this case came after the time the Title III authorizations were issued—by which time, as we have noted, Judge Feikens had learned of [petitioners'] criminal activity" (*id.* at 16a).

Finally, the court of appeals agreed (Pet. App. 16a) that certain statements made by Judge Feikens in an August 1984 newspaper interview "lend themselves to the interpretation that the judge, although obviously sympathetic toward black people, tended to patronize them." The court of appeals concluded (*ibid.*), however, that "[i]mpolitic though the statements may have been, we can find in them no indication whatever that the Title III wiretap authorizations issued more than three years earlier were based on anything other than the strong showing of wrongdoing presented to the judge by the government prosecutors."

ARGUMENT

Petitioners renew their contention that Judge Feikens lacked the neutrality and detachment required by the Fourth Amendment of a judicial officer asked to authorize electronic surveillance. The court of appeals correctly rejected petitioners' claims.

1. First, petitioners argue (Pet. 14-26) that Judge Feikens lacked the requisite neutrality and detachment because of his role as judicial supervisor of the receivership that had been imposed on the Detroit Water and Sewerage Department.[2] As the court of appeals noted

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[2] As the court of appeals explained in another case involving the DWSD receivership, *In re City of Detroit*, 828 F.2d 1160, 1167 (6th

(Pet. App. 10a-12a), this Court has identified two situations in which a magistrate's official role keeps him from being neutral and detached. The first includes cases in which the magistrate has a pecuniary interest in the outcome of the matter before him. See, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). The second consists of those in which the magistrate effectively is a member of the prosecution team. See, *e.g.*, *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Here, as the court of appeals found (Pet. App. 11a-12a), Judge Feikens had no personal financial interest in the water and sewerage department.[3] Similarly, Judge Feikens' actions in authorizing surveillance and in supervising the receivership did not involve any impermissible "affiliation[s] * * * with prosecutors or police." *Shadwick* v. *Tampa*, 407 U.S. 345, 350 (1972).

Despite the substantial differences between this case and those in which this Court has found a magistrate to lack the necessary neutrality, petitioners suggest that Judge Feikens could not have assessed the Title III applications

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Cir. 1987) (per curiam), it is inaccurate to refer to Judge Feikens himself as the receiver (see, *e.g.*, Pet. 14-15). Judge Feikens was the judicial supervisor of the receivership, while Mayor Young was the judicially-appointed administrator—in effect, the receiver. In *In re City of Detroit*, which was decided on the same day as this case by the same panel, the court of appeals declined to issue a writ of mandamus ordering Judge Feikens to recuse himself from ongoing litigation involving the treatment plant.

[3] Petitioners' reliance (see Pet. 12, 23) on *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), is misplaced. In that case the Court held that the defendant was improperly compelled to stand trial for traffic offenses before the village mayor, who was responsible for village finances and whose court, through fines, forfeitures, costs, and fees, provided a substantial portion of the village's funds. In this case, the investigation into petitioners' wrongdoing had no effect on the water and sewerage department's finances.

in a detached fashion because of his role in the DWSD receivership. According to petitioners, Judge Feikens' active, managerial role with respect to the treatment plant led him to become so deeply concerned about the city's water and sewerage department that he would take any suggestion of corruption there as a personal affront. As the court of appeals pointed out (Pet. App. 12a), however, Judge Feikens did not take on an active role in connection with the DWSD until after he had granted the Title III applications: "the record does not show that the judge had more than a handful of occasions even to think about the receivership after its establishment and before the wiretaps were authorized."[4]

Moreover, the premise of petitioners' argument is unsound. There is no reason to believe that active judicial involvement in institutional litigation tends to prejudice the judge on subjects involving the institution under supervision. In this case, petitioners point to no evidence of such bias other than Judge Feikens' habits of speech and his expressed satisfaction with the success of the receivership proceeding (Pet. 25). That a federal district judge is concerned for the success of a public institution does not suggest that he will be unable to " 'hold the balance nice, clear and true between the State and the accused' " (*Ward* v.

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[4] According to the then-assistant director of the water and sewerage department, Judge Feikens asked, some time in 1979 or 1980, whether anything illegal was going on at the treatment plant (Pet. App. 13a). Petitioners suggest (Pet. 24) that this inquiry indicates that Judge Feikens had suspicions of wrongdoing or desired that an investigation be conducted. There is no indication, however, that Judge Feikens' question (whatever its exact content may have been) was more than a generalized inquiry into possible misconduct at the plant.

Village of Monroeville, 409 U.S. 57, 60 (1972) (citation omitted)) when a warrant application is presented to him.[5]

2. Petitioners further contend (Pet. 26-30) that Judge Feikens was disqualified from authorizing the wiretaps because he harbored personal animosity against them. Petitioner Bowers cites (Pet. 27-28) the judge's statement in a newspaper interview in August 1984 that Mayor Young had been unwise to "choose a person like Darralyn Bowers" because she had been involved in "block-busting." Although Judge Feikens noted that the incident had occurred "years before" the Vista prosecution, he did not indicate that it had come to his attention before he authorized the Title III surveillance. As the court of appeals noted (Pet. App. 15a), "[i]n context, and given the amount of water that had gone over the dam between the time of the wiretap authorizations and the time of the interview, these statements have little probative value."

Petitioner Beckham cites (Pet. 29) Judge Feikens' reported response—"[N]ot that fellow Beckham"—to the suggestion in the summer of 1981 that the position of assistant director of the treatment plant be combined with the position of director that Beckham then occupied. As

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[5] Petitioners object (Pet. 18-20) to the court of appeals' consideration of the fact that Judge Feikens' involvement with the treatment plant was part of his official duties, not an extra-judicial interest (see Pet. App. 13a). While the court of appeals considered that factor, it also rejected on its merits petitioners' theory that Judge Feikens had become excessively concerned with the receivership (see *id.* at 14a). Moreover, petitioners advance no reason to question the well-settled principle that judicial bias may not be premised on information that comes to the court in the course of its official duties. See, *e.g.*, Rules Governing Section 2255 Proceedings For the United States District Courts, Rule 4(a) (28 U.S.C. 2255, at 368) (collateral attack on federal convictions initially presented to judge who entered conviction); *Katsaros* v. *Cody*, 744 F.2d 270, 283 (2d Cir.), cert. denied, 469 U.S. 1072 (1984).

the court of appeals noted (Pet. App. 15a), that statement did not reflect any bias that Judge Feikens brought to the surveillance requests, but instead was apparently a response to the information that had come to his attention in the Title III applications: "monthly reports on Mr. Beckham stuffing cash-filled envelopes into his pockets." The district court and the court of appeals correctly found that the evidence on which petitioners rely does not support the inference that Judge Feikens was personally biased against them.

3. Finally, petitioners argue (Pet. 26-30) that Judge Feikens was disqualified from authorizing the surveillance because he is prejudiced against black people. They cite comments made by Judge Feikens in the 1984 newspaper interview which, in the words of the court of appeals (Pet. App. 16a), "lend themselves to the interpretation that the judge, although obviously sympathetic toward black people, tended to patronize them." In that interview, Judge Feikens stated that "[a]s the black people come into political power in all the big cities of the United States, they have to learn how to climb hills. Some won't. Some will not understand how to run government. Some will not understand leadership." *In re City of Detroit*, 828 F.2d at 1163.[6]

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[6] The court of appeals noted in *In re City of Detroit* that the remarks to which petitioners point had been the subject of a complaint against Judge Feikens before the Sixth Circuit Judicial Council. A committee of the Judicial Council recommended that the complaint be dismissed, explaining that " 'though Judge Feikens made an untrue and regrettable statement in the course of the interview, the full transcript demonstrates that he had no intention of denigrating black people generally. The treatment by the newspaper of a single sentence from a lengthy interview led to the perception honestly expressed in the complaints. However, the Committee is convinced that this treatment is inconsistent with the general tenor of the interview and with the well known and documented concern of Judge Feikens for racial justice.' " 828 F.2d at 1163 n.1.

The court of appeals correctly concluded in *In re City of Detroit*, 828 F.2d at 1168, that the comments quoted above "clearly do not evince racial animus or hatred." And the court of appeals in this case properly found (Pet. App. 16a) that the remarks give "no indication whatever" that Judge Feikens' decisions on the Title III warrant applications were influenced by racial prejudice.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioners also maintain (Pet. 13-14) that the court of appeals improperly employed "harmless error" analysis when it observed (Pet. App. 16a-17a) that "[i]f someone other than Judge Feikens had heard the Title III applications, the result would have been precisely the same." This remark, which was made in part to refute the suggestion that the assignment of the surveillance applications to Judge Feikens violated local rules (see *id.* at 16a n.2), does not indicate that the court of appeals based its ruling rejecting petitioner's "neutral magistrate" claim solely on the objective sufficiency of the applications. Moreover, this case is wholly unlike *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450-456 (1971), cited by petitioners (Pet. 13-14), in which the issuing magistrate was supervising the prosecution and this Court declined to consider the objective sufficiency of the application as an answer to the violation of the "neutral magistrate" guarantee.

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